UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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SHORN JONES,

Plaintiff,

v. 15 CV 1369 (LGS)

BRYANT PARK MARKET EVENTS, LLC,

Defendant.

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New York, N.Y.
August 13, 2015
11:10 a.m.

Before:

HON. LORNA G. SCHOFIELD,

District Judge

APPEARANCES

ABDUL K. HASSAN
Attorney for Plaintiff

OVED & OVED, LLP
Attorneys for Defendant
BY: ANDREW J. URGENSON

(Case called)

THE COURT: So there is a pending motion for summary judgment and I'm prepared to rule on it.

Plaintiff brings suit against Bryant Park Market Events LLC for failure to pay overtime wages for hours worked in excess of 40 under the Fair Labor Standards Act and the New York Labor Law. Defendant moves for summary judgment on the FLSA claim and asks if the motion is granted, I decline to exercise supplemental jurisdiction over the state claims. For the reasons I will now explain, the motion is granted and I decline to exercise supplemental jurisdiction.

I won't recount the facts. I know you are both familiar with them.

As far as my thinking, defendant does not dispute that it is an employer for purposes of FLSA. Instead, defendant invokes the so-called "seasonal recreational establishment exemption." This is an affirmative defense for which the defendant bears the burden of proof.

The exemption provides in relevant part that the FLSA's overtime provision "shall not apply with respect to" "any employee employed by an establishment which is an amusement or recreational establishment... if... it does not operate for more than seven months in any calendar year..." 29 U.S.C. Section 213(a)(3).

First, I reject plaintiff's argument that the answer

does not adequately plead this exemption as an affirmative defense. The answer to the third affirmative defense reads, "Plaintiff is exempt from the overtime provisions of the FLSA and the New York Labor Law because defendant is seasonal amusement or recreational establishments." The answer is sufficient to put plaintiff on notice of defendant's affirmative defense.

Even assuming for purposes of argument that the answer did not sufficiently plead the defense, the "waiver of affirmative defenses not raised in a defendant's answer is not automatic," and courts may allow a defense to be raised for the first time on summary judgment if "plaintiffs are provided with notice and an opportunity to respond." *Gilmore v. Gilmore*, 503 F. App'x 97, 99 (2d Cir. 2012). Here, plaintiff has had both notice and ample opportunity to respond to the defense.

Second, defendant has sustained its burden of showing that all of the Winter Village -- including the rink, the Celsius restaurant where plaintiff worked, and the holiday shops -- operated for less than seven months in a year. Defendant's permit for 2014 to 2015 from the city's Park and Recreation Department lasted from October 2, 2014 to March 16, 2015, which is less than seven months.

In addition, defendant's contract with the organization that manages Bryant Park limits defendant's presence in Bryant Park to less than seven months. Plaintiff

admits that Winter Village was open to the public for less than seven months, but argues that its off season activities likely last longer because it takes time to negotiate the contracts and acquire permits. Such off season activities, however, say nothing about how long Winter Village operates, which both parties agree is less than seven months.

Therefore, the only open question is whether plaintiff was employed by "an establishment which is an amusement or recreational establishment." The FLSA does not define such an establishment, and the legislative history it sparse. "Courts have noted that a House Committee Report on a proposed 1965 amendment to the FLSA stated that the 'amusement or recreational establishment' exemption was meant to cover 'such seasonal recreational or amusement activities as amusement parks, carnivals, circuses, sport events, parimutel racing, sport boating or fishing, or other similar related activities.'" *Chen v. Major League Baseball*, 6 F.Supp. 3d 449, 455 (S.D.N.Y. 2014).

The corresponding regulations provide, "Amusement or recreational establishments... are establishments frequented by the public for its amusement or recreation... Typical examples of such are the concessionaires at amusement parks and beaches." 29 C.F.R. Section 779.385. I find that the skating rink in the Winter Village is a recreational establishment within this definition.

Plaintiff argues that even if the skating rink might be a recreational establishment, the Celsius pop-up restaurant where plaintiff worked was a separate establishment that was not recreational and therefore not exempt. However, in explaining the recreation exemption, a 1967 Department of Labor opinion letter advised that "two or more business activities operated integrally on the same premises usually will be considered a single establishment within the meaning of the act."

Here, the entire Winter Village was operated by defendant, under a common construction plan, under the same permit from the city. In addition, defendants processed payroll for both the rink and Celsius on the same system and sold package deals combining skating and dinner. Further, the contract defendant entered into with the entity that manages Bryant Park defines the single term "rink" as the stating rink "together with associated facilities as described herein" and also refers to the "restaurant at the rink."

The contract also provides that the entire Winter Village, referred to collectively as "the installment," "is being provided... as an amenity to the public for the enhancement of the park and the overall experience of the visitors to the park," thereby underscoring the primarily recreational nature of the entire Winter Village. Even the Winter Village website underscores that the skating rink is

integral to the restaurant, which is described as a "glass-enclosed, two-story, rink-side venue... with spectacular views of Winter Village at Bryant Park, the rink, and the Christmas tree."

Defendant has also produced evidence to show that its revenue from the rink is greater than the revenue from Celsius. As the Tenth Circuit concluded in a case where a ski resort invoked the FLSA's "recreational establishment in a national park exemption," 29 U.S.C. 213(b)(29), the mere "fact that the defendant offers lodging, retail shops, restaurants, and other activities besides skiing does not disqualify it from the" exemption, particularly where "ski operations represent the largest revenue-producing category for the defendant." That's *Chessin v. Keystone Resort Management, Inc.*, 184 F.3d 1188, 1194 (10th Cir. 1999). Similarly, here, that Winter Village offers a restaurant and holiday shops does not remove it from the exemption.

Plaintiff's argument that defendant did not operate Winter Village is factually incorrect. Plaintiff is also incorrect in arguing that because defendant (unlike the Winter Village) operated all year round, the seasonal exemption does not apply. The relevant regulations explicitly distinguish between "establishments" on the one hand, and "enterprises" on the other. An "establishment" is defined as a "distinct physical place of business." 29 C.F.R. Section 779.23. An

"enterprise... may include several separate places of business." *Id.* "For the purposes of the seasonal recreational establishment exemption, an individual is employed by the establishment at which he works, regardless of any enterprise that may operate or control the establishment." That is also from *Chen*, 6 F.Supp.3d at 458. Accordingly, the analysis is properly limited to the establishment at issue -- the Winter Village.

Any arguments I have not expressly addressed are rejected.

In sum, defendant is exempt from FLSA's overtime provision. The motion for summary judgment granted. I decline to exercise supplemental jurisdiction over the remaining claims. And I will ask the clerk of the court to close the open motion and to close the case.

Thank you very much, counsel.

MR. URGENSON: Thank you, your Honor.

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